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Supreme Court, U.S.
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No. 88-947

# In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS C. HARRISON and RITA HARRISON,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## REPLY BRIEF

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## ARGUMENT

### I

### THE AMENDMENTS TO SECTION 7430 HAVE NOT DEFINED WHETHER THE "POSITION OF THE UNITED STATES" INCLUDES THE POSITION SET FORTH IN A NOTICE OF DEFICIENCY.

The Internal Revenue Service ("the IRS") admits that there is a conflict in the Circuit Courts of Appeals regarding what constitutes the "position of the United States" in a civil proceeding under 26 U.S.C. § 7430 (1982) ("Section 7430"). However, the IRS asserts that this conflict was resolved by Congress in Section 1551(e) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2753. This assertion is false and misleading.

If the conflict was resolved, why does not the IRS state in its memorandum in opposition whether the "position of the United States", as defined in the 1986 amendment, includes the position set forth

in a notice of deficiency. The IRS only states that this new definition covers "specified administrative actions by the IRS." Memo. Opp. 5. In reality, the "specified administrative actions" only relate to certain post-petition administrative conduct. 26 U.S.C. §7430(c)(4)(B)(1986). The 1986 amendment does not address whether the "position of the United States" includes pre-litigation actions.

In Weiss v. Commissioner, 850 F.2d 111, 115-16 (2nd Cir. 1988), the court specifically rejected the IRS's argument that the 1986 amendment, which applied in that case, limited the Court's inquiry to certain post-petition conduct, thus purportedly resolving the conflict in the circuits. The Court stated:

> Since both the 1982 version of §7430(c)(2)(A) and the 1986 enactment at issue here provide that the court is to look to the "position of the United States"

> in the civil proceedings, we believe that they are not materially different for purposes of determining the circumstances that constitutes a position of the United States. Id. at 115-16 (Emphasis added).

Further, the court also added:

> We see nothing in the language of the amended version of § 7430 or in its legislative history to suggest that Congress intended to narrow the pre-1986 amendments view of § 7430 or to limit strictly an examination of the government's position solely to that taken in court. Id. at 116.

Thus Weiss, as it applies to this case, held that the 1986 amendment did not change the definition of the "position of the United States."

In addition, both the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Ninth Circuit noted that the 1982 and 1986 versions of § 7430 are consistent in determining that the position of the United States extends to the reasonableness of the behavior which forced

a taxpayer into litigation. Comer Family Equity Pure Trust v. Commissioner, 856 F.2d 775, 780 n. 1 (6th Cir. 1988); Silwa v. Commissioner, 839 F.2d 602, 607 n. 6 (9th Cir. 1988). There remains a conflict in the circuits.

The changes brought about by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6239, 102 Stat. 3342, 3745-46, also do not address the issue presented in this case. Under the 1988 amendment, the position of the United States could be established prior to the date of the notice of deficiency §7430(c)(7)(B)(i)(1988). However, if the IRS bypasses the administrative process, as occurred here, the amended version does not define whether the position of the United States includes the position set forth in a notice of deficiency. §7430(c)(7)(B)(ii)(1988). Even the IRS in

its memorandum in opposition does not state whether the "position of the United States", as defined in the 1988 amendment, includes the position set forth in a notice of deficiency. Again, the IRS only states that this new amendment covers unspecified "different administrative actions of the IRS." Memo. Opp. 5.

This Court has denied certiorari in a petition pertaining to Section 7430. Saul v. United States, No. 87-1676 (June 30, 1988). However, the facts in Saul are substantially different than the matter at hand. In Saul, the IRS had a reasonable basis in fact and law for its initial determination. Saul, Memo. Opp. 5. Here, the taxpayers were issued a notice of deficiency solely because a consent to extend the statute of limitations was not in the IRS's files. Further, Weiss was not decided until June 27, 1988 and presumably

was not available for the Court's review. The IRS in Saul also maintained that the "conflict was definitively resolved by the Tax Reform Act of 1986." Id. at 4 (Emphasis added). This assertion is incorrect for the reasons set forth above.

## II

## THE IRS ACTED UNREASONABLY IN ISSUING THE NOTICE OF DEFICIENCY.

This case focuses on the reasonableness of the IRS's behavior which is a relevant determination under any version of § 7430.[1] §7430(c)(2)(A)(i) (1982), § 7430(c)(2)(A)(i)(1986); and §7430 (c)(4)(A)(i)(1988). The IRS portrays itself with no alternative but to issue the

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[1] Under the current version of §7430, the term "unreasonable" has been replaced by the phrase "not substantially justified." 26 U.S.C. § 7430(c)(2)(A)(i) (1986). This phraseology has the same meaning. See Smith v. United States, 850 F.2d 242, 245, n. 8.

notice of deficiency because it never received the consent, even though it waited to virtually the last moment to request an extension. This portrayal assumes that a taxpayer is required to execute the consent, an incorrect assumption. Shortly after Section 7430 was enacted, the IRS promulgated Proc. & Admin. Regs. 301.7430-1(f)(2)(i)(1984), which provided that a taxpayer is precluded from recovering attorney's fees and costs if the taxpayer refuses to consent to extend the period for assessment. In Minahan v. Commissioner, 88 T.C. 492, 507-8 (1987), the full Tax Court struck down this regulation because it permitted the IRS to "coerce waivers" of the statute of limitations. The court noted that the regulation "....gives radical control of the statute of limitations to the respondent [IRS]." Id. at 506. See also Moran, 88 T.C. 738,742

(1987). Thus, it is illogical to maintain that the IRS acted reasonably in issuing the notice of deficiency because it did not receive the consent when in fact, the taxpayers were under no obligation to even execute the consent. To find otherwise would yield the entire control of the statute of limitations to the IRS, a result contrary to the Tax Court's finding in Minahan. Whether or not a taxpayer executes a consent is only relevant to the determination whether a taxpayer has exhausted the administrative remedies available to such party. The IRS conceded that the Harrisons exhausted their administrative remedies and the Tax Court found the Harrisons executed and mailed the consent, thus exhausting their administrative remedies. The IRS issued the notice of deficiency solely to circumvent the statute of limitations.

Such action is arbitrary and inherently unreasonable.

## III

### THE TAX COURT HAS NOT FOUND IT REASONABLE TO ISSUE A PROTECTIVE NOTICE OF DEFICIENCY UNDER SECTION 7430 WHEN THE STATUTE OF LIMITATIONS IS ABOUT TO EXPIRE.

The IRS has asserted that the Tax Court has specifically recognized the reasonableness of issuing a protective notice of deficiency when the statute of limitations is about to expire. This assertion is incorrect. The Tax Court has refused to examine the reasonableness of issuing a notice of deficiency because it occurs before the filing of a petition. In Baker v. Commissioner, 83 T.C. 822, 827 (1984), vacated and remanded on other grounds, 787 F.2d 637, 644 (D.C. Cir. 1986), the Tax Court interpreted the "position of the United States" under Section 7430 as requiring an examination

of the reasonableness of the government's position only after the petition has been filed.

The cases cited by the IRS to support its argument are inapposite. Wasie v. Commissioner, 86 T.C. 962 (1986), was decided before Minahan and Moran and merely reaffirms the Tax Court's decision in Baker. The IRS's reliance on Chaum v. Commissioner, 69 T.C. 156 (1977) and Luhring v. Glotzbach, 304 F.2d 560 (4th Cir. 1962), are also inapplicable because both cases were decided before Minahan and Moran, before Section 7430 was initially enacted and recovery of attorney's fees was not the subject of these cases.

## IV

### THE CASE AT BAR AFFORDS THIS COURT AN OPPORTUNITY TO RESTORE TO THE FEDERAL COURT SYSTEM CONTROL OVER ITS OWN DOCKET.

A decision in this case against the IRS will simply force it to review the merits of a case before forcing a taxpayer into litigation. Under the "in-court" standard asserted by the IRS, a taxpayer is without any remedy even though the IRS forced the taxpayer into litigation by simply mailing a briefly worded notice of deficiency without even investigating the merits of its determination. Taxpayers should not be burdened with legal costs and the overburdened federal court system with additional caseload, all as the result of the IRS's arbitrary actions.

The overwhelming majority of tax disputes occur after the IRS has issued a notice of deficiency. Without the remedy

provided by Section 7430, there isn't any disincentive for the IRS to continue conducting business as usual.

## CONCLUSION

It is, therefore, respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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